Filed 1/26/10 In re Baby Girl B. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re BABY GIRL B., a Person Coming Under the Juvenile Court Law.	B218460 (Los Angeles County Super. Ct. No. CK 70980)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.P., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Stephen Marpet, Commissioner. Affirmed.

Gerard McCusker, under appointment by the Court of Appeal, for Defendant and Appellant.

Robert E. Kalunian, Acting County Counsel, James M. Owens, Assistant County Counsel, and Byron G. Shibata, Deputy County Counsel, for Plaintiff and Respondent.

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Baby Girl B. was born in December 2007, testing positive for drugs. Her mother (not a party to this appeal) was uncooperative with the hospital staff and with the social workers from the Los Angeles County Department of Children and Family Services (DCFS), disappearing for a while after B.'s birth, and DCFS took appropriate steps to protect B. Appellant M.P., the alleged father of B., first appeared in this case on July 14, 2009, for the hearing held pursuant to Welfare and Institutions Code section 366.26.[1] The purpose of the hearing was to provide for a permanent plan placing the child for adoption and terminating parental rights. M.P. requested a continuance. The court denied the request, stating that there were no grounds that M.P. could raise that would forestall the adoption. The court terminated parental rights and freed B. for adoption. M.P. appeals and we affirm.

FACTS

M.P. may or may not have been present at B.'s birth. It is certain, however, that M.P. has not had any contact whatsoever with B. at any time after B.'s birth. In May 2009, DCFS learned from B.'s mother that M.P. was in prison. DCFS was finally able to find M.P. through the prison locator.

When contacted by DCFS on May 18, 2009, M.P. stated he was B.'s father; that he had been aware of B.'s mother's pregnancy; that he and B.'s mother "were romantically involved"; that he never provided for B. because he was not asked to; that he wished to take a DNA test; that he wanted a lawyer and desired to be present at all court hearings.

As noted, M.P.'s first and only appearance in this case came on July 14, 2009, on the occasion of the ultimate section 366.26 hearing.

One would think that the foregoing would suffice to lead to the conclusion that the trial court's orders denying a continuance and terminating M.P.'s parental rights should both be affirmed. These skeletal facts present the paradigm of the abandonment of a child by its father, assuming that M.P. is B.'s father.

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[1] All further statutory references are to the Welfare and Institutions Code.

There is more support, however, for the trial court's rulings that are on appeal. We therefore go on to summarize the remaining background facts and events.

B.'s mother knew that M.P. was married, that he was about 42 years old and that he lived somewhere in Norwalk. DCFS learned in time that M.P. had children from his existing marriage. B.'s mother had a history of drug abuse; at birth, B. tested positively for amphetamines and methamphetamines. B.'s mother also had a criminal history for receiving stolen property and for the possession of illegal drugs.

At the initial detention hearing on December 10, 2007, neither the mother nor M.P. appeared. At some point in December 2007, B.'s mother simply disappeared and DCFS was unable to find her. DCFS was also unable to locate M.P. The court ordered unification services for both parents and B. was placed in foster care.

During December 2007 and January 2008, DCFS searched for B.'s mother and for M.P. On January 18, 2008, the trial court found that DCFS had acted with diligence in trying to locate B.'s mother and M.P., a finding that is amply supported by the record. We do not detail DCFS's efforts save to note that they were sustained and energetic but unsuccessful, which suggests that the mother and M.P. were determined to escape the bonds of parenthood. The trial court found M.P. to be B.'s alleged father, sustained the section 300 petition and terminated reunification services for the mother and M.P., who still could not be found.

The six-month hearing took place on July 18, 2008. DCFS had obtained permission from the court to give notice by newspaper publication to B.'s mother and to M.P. who were still missing. Sadly enough, child abuse allegations against the prospective adoptive parents were substantiated and B. had to be placed elsewhere. The court ordered further due diligence searches on the part of DCFS for B.'s mother and for M.P.

B. was placed in a new home, and in August 2008 DCFS reported that B. was doing well. At about this point, B.'s birth certificate surfaced. M.P. was not listed as the father.

In November 2008, the trial court again found that DCFS had searched for B's mother and for M.P. with due diligence but these two people were still missing, a situation that continued until April 2009, when B.'s mother finally contacted DCFS. By this time, B. was doing very well with her new prospective parents and her birth mother visited her three times in April and May 2009. B.'s mother now informed DCFS that she was not sure that M.P. was B.'s father.

B.'s prospective adoptive parents were approved in November 2008 after a homestudy had been completed.

The first section 366.26 hearing took place on May 16, 2009. B.'s mother appeared but M.P. did not. The court ordered a statewide jail removal for M.P. and ordered DCFS to either bring M.P. to the hearing or to obtain a signed waiver of appearance. M.P. received actual notice of the new hearing date of July 14, 2009, on June 3, 2009.

During the section 366.26 hearing on July 14, 2009, mother's counsel stated that mother was reluctantly agreeing to the adoption and that she regretted her past actions.

M.P., as noted, was present at this hearing. His counsel stated that he was requesting a continuance and that he had only spoken briefly with M.P. for the first time that morning. Counsel went on to state: "I would appreciate some time to get familiar with the case. I don't know if any defenses apply or any exceptions, so a bit more time to understand what father's position is, I think that --" The trial court interrupted, stating that M.P. had been found to be the alleged father and then stated that "[f]rankly, there is no issues that I can see that you could possibly raise to forestall any adoption. At best, he is an alleged father. I don't believe he has even seen this child except at the hospital, and he is not even on the birth certificate. [¶] It is clear to me that there is just no reason and basis to continue the case and delay this permanent plan for this child, so I'm going to deny your request to continue."

The court terminated mother's and M.P.'s parental rights.

DISCUSSION

1. It Was Not Error to Deny the Request to Continue the Section 366.26 Hearing

Appellant contends that the trial court erred in denying his request for a continuance.

We begin with two general observations.

First, in the usual and normal case, a lawyer's request for a continuance should be granted when, on the day of a dispositive hearing, the lawyer appears to have had only a few minutes with the client through no fault of either the client or the lawyer.

Second, section 352, in authorizing a court to continue a hearing, specifically states that "no continuance shall be granted that is contrary to the interest of the minor. In considering the minor's interests, the court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements."

As far as the first point is concerned, the situation that presented itself on July 14, 2009, was neither usual or normal, even if one gives those two words a very liberal reading in the sad world of section 366.26 hearings. M.P. appeared as an alleged father, and here the word "alleged" is freighted with special meaning, who had never seen the child who was now 18 months old. While for some unknown portion of the time M.P. was imprisoned,[2] his attitude toward B. seems to be summed up in M.P.'s feckless statement that he never gave anything toward B.'s support because no one asked him. The fact of the matter is that M.P. abandoned B. from the moment of her birth. There is simply no trace of him in B.'s life at any point in time.

On July 14, 2009, the trial court was presented with the unusual circumstance that an alleged father, i.e., a putative parent, had never seen the child, much less spent any

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[2] We note parenthetically that prison inmates are not held incommunicado. A father with any kind of commitment to a child can find ways of communicating even from prison. Yet it is DCFS who found M.P., who never made an effort to contact the person or persons who were taking care of B.

time with it. And the course of the proceedings had reached an advanced stage. These two circumstances, when combined, made for an unusual case.

As the trial court pointed out, there simply was no possibility that M.P. could forestall B.'s adoption. Subdivision (c) of section 366.26 provides that the court must terminate parental rights if the parent has not visited or contacted the child for six months unless certain exceptions are found to exist. Among the six exceptions to this rule, the only exception that remotely applies here is set forth in subdivision (c)(1)(B)(i), which is when the "parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." The other exceptions are on their face not applicable.[3] It requires no citation of authority, although such are legion, to conclude that M.P. cannot rely on the exception set forth in subdivision (c)(1)(B)(i) of section 366.26. Because he has never visited or contacted B., there was no relationship to preserve.

This leads us to our second basic point. Under section 352, in considering the request for a continuance, the trial court was required to give substantial weight to a B.'s need for prompt resolution of her custody status and to B.'s need for a stable environment. On July 14, 2009, the adoptive parents, under whose care B. had prospered, were on hand. After having been completely abandoned at birth by both parents and suffering abuse at the hands of the first set of prospective adoptive parents, what B. required were true parents and a home. These could not be deferred while a lawyer tried to cobble together a theory out of nothing.

We do not hold, and do not mean to suggest, that a request for a continuance by counsel newly appointed to the case should not receive hospitable treatment. In the usual case, the request should receive such treatment. But, for the reasons we have set forth,

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[3] B. is younger than 12 years old, B. was not placed in a residential treatment facility, B. was not living with a foster parent unwilling to adopt, there are no sibling relationships, and B. is not an Indian child. (§ 366.26, subd. (c)(1)(B)(ii)-(vi).)

this was not the usual case. Under the facts of this case, the trial court's action was correct and well within the ambit of its discretion.

2. The Authorities Cited by Appellant Do Not Apply

This is not a case like *In re Michael R.* (1992) 5 Cal.App.4th 687 when the trial court thought that once a section 366.26 was held, the court had no authority to even consider a request for continuance. The trial court in the case before us did not fall into this error.

In *In re John M.* (2006) 141 Cal.App.4th 1564, the nonoffending, noncustodial natural father requested a continuance, which was denied by the trial court. The father, who lived out of state, had been in touch with the 13-year-old boy. The trial court denied the continuance because it was reluctant to place the boy with his natural father who was an "'unknown entity.'" (*Id.* at pp. 1568-1569, 1572.) The appellate court concluded that as the problem with the father was that little was known about him, the trial court should have continued the case to allow the father to present information about himself. (*Id.* at p. 1572.) In this case, the trial court was fully advised about M.P.'s complete lack of contact with B. since her birth, which was the dispositive fact in this case.

In re Julian L. (1998) 67 Cal.App.4th 204, 206-207, was a case when, during a section 366.26 hearing, a lawyer who had been newly appointed to the case a week earlier for the mother requested a continuance because the mother was not present and the new lawyer did not know what the mother's desires were. The appellate court held that it was error to deny the request. (*Id.* at pp. 208-209.) "A reasonable continuance would have afforded counsel an opportunity to ascertain mother's wishes and to effectively represent her." (*Id.* at p. 208.) In the case before us, it made no difference that M.P. wanted to forestall the adoption; there simply was no basis upon which the court could have done anything other than what it did do. This is not a case in which, as appellant contends, "sufficient information is lacking" and the request for a continuance should therefore be granted. M.P. had compiled a track record of abandonment during the foregoing 18 months, and the court was fully advised of that record.

Appellant takes issue with DCFS's position that, as an alleged father, he has fewer rights than a biological father. While DCFS is generally correct (*In re O. S.* (2002) 102 Cal.App.4th 1402, 1406), we do not base our decision on the fact that M.P. is only an alleged father. It is therefore not necessary to address the authorities that deal with the differences between alleged and biological fathers.

Finally, appellant contends that he was denied the right to present his case and that this is "structural error" under the United States Constitution. Specifically, appellant contends not only that the denial of the continuance was error but because counsel was "denied any meaningful opportunity to review the case file and communicate with [appellant], it is impossible to know what arguments counsel would have made. . . . The juvenile court deprived [appellant] of a meaningful opportunity to be heard."

As we have already noted, among the six exceptions to the rule requiring the termination of parental rights, the only one that remotely applies is that set forth in subdivision (c)(1)(B)(i) of section 366.26, which is when the "parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

It is undisputed that M.P. has *never* visited B. This precludes the application of this exception, no matter what the "case file" may have contained or what M.P. may have wished to tell his lawyer. Appellant's argument is predicated on the assumption that it is *possible* that there was some information or evidence that might have been presented, if only counsel would have had the time to learn about it. But the nub of the matter is that it was a known and undisputed fact that M.P. never visited B. (in fact, he completely abandoned her) and, in light of this, it was impossible to speak of the benefits of continuing a parent-child relationship. In other words, this was not a situation when counsel's ingenuity may have produced some sort of "defense," however unknown that "defense" may have been when counsel requested the continuance. The situation was finite and final; M.P. had abandoned B. and there was therefore no relationship to preserve.

Because the trial court did not err in denying the request for a continuance, it is unnecessary to delve into the question whether this was "structural error." We note here that, while the continuance was denied, the court did not foreclose M.P. from testifying nor did the court foreclose argument by counsel.

DISPOSITION

The judgment (order) is affirmed.

FLIER, Acting P. J.

We concur:

BIGELOW, J.

LICHTMAN, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.